Supreme Court, U.S.
FILED

No. 03- 031192 FEB 8 - 2004

OFFICE OF THE

IN THE

Supreme Court of the United States

STAWSKI DISTRIBUTING CO., INC.,

Petitioner,

v.

BROWARY ZYWIEC S.A., doing business as Zywiec Breweries, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition involves whether the federal government has the absolute right to supplant the powers granted to the states by the Twenty-first Amendment to regulate the distribution of alcoholic beverages within their borders. In this case, the Court of Appeals for the Seventh Circuit completely ignored this Court's precedent and ruled that: (i) state legislation passed under the grant of authority contained within the Twenty-first Amendment is absolutely and always subordinate to federal legislation pursuant to the Supremacy Clause; and (ii) the only power granted to the states under the Twenty-first Amendment is "to restrict imports without regard to the dormant commerce clause."

Discarding, without explanation, the balancing test established by this Court as the method for resolving potential conflicts between state enactments promulgated pursuant to the Twenty-first Amendment and federal law, the Seventh Circuit reversed the District Court and held that the Federal Arbitration Act pre-empts Illinois' state liquor laws. Unless reviewed by this Court, the Court of Appeals' ruling opens the door for federal regulators to trample on the powers reserved to the states to regulate the importation and distribution of liquor within their borders.

Thus, petitioners respectfully request that certiorari be granted on the following question:

> Whether the Federal Arbitration Act pre-empts the exercise by Illinois of a core power granted pursuant to the Twenty-first Amendment without regard to the competing state and federal interests?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Stawski Distributing Co., Inc. ("Stawski"), has no parent corporation and no publicly held company owns 10% or more of its stock.

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Stawski Distributing Co., Inc., the Petitioner, respectfully prays that this Court issue a writ of certiorari to review the opinion in this case of the United States Court of Appeals for the Seventh Circuit dated November 20, 2003.

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 349 F.3d 1023 (Appendix A). The Court of Appeals was reviewing a decision and order of the District Court that was unofficially reported at 2003 WL 21209860 (N.D. Ill. May 22, 2003) (Appendix B).

STATEMENT OF JURISDICTION

The Court of Appeals' decision was entered on November 20, 2003. Stawski filed a timely petition for rehearing that was denied on December 11, 2003 (Appendix C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following enactments, in relevant part, are involved in this case:

i) The Twenty-first Amendment to the Constitution provides:

> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

ii) The Federal Arbitration Act, codified at 9 U.S.C. § 1, *et seq*., including and incorporating the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"):

Article II of the New York Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The Court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commence to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any party thereof, or an agreement in writing to submit to arbitration an existing controversy

arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

iii) The Illinois Beer Industry Fair Dealing Act, codified at 815 ILCS § 720, *et seq.* states in pertinent part:

§ 9 (1) If the brewer or wholesaler who is a party to an agreement pursuant to this Act fails to comply with this Act or otherwise engages in conduct prohibited under this Act, the affected party may maintain a civil suit in court if the course of action directly related to or stems from the relationship of the individual parties under the agreement, provided that any such suit shall be filed in a State or federal court of competent jurisdiction located in Illinois.

(6) With respect to any dispute arising under this Act or out of the relationship between the brewer and wholesaler, the wholesaler and the brewer each has the absolute right before it has agreed to arbitrate a particular dispute to refuse to arbitrate that particular dispute . . . A brewer may not, as a condition of entering into or renewing an agreement, require the wholesaler to agree to arbitration instead of judicial remedies.

STATEMENT OF THE CASE

A. Basis of Jurisdiction in the District Court

This is an action to enjoin the wrongful termination of a long-standing and successful distribution relationship between a Polish manufacturer of beer ("Zywiec") and its original United States importer and distributor ("Stawski"). Stawski is an Illinois corporation located in Chicago. Zywiec is a Polish corporation. Jurisdiction in the District Court was founded on 28 U.S.C. § 1332(a)(2), based on the parties' complete diversity, and the matter in controversy exceeded $75,000 exclusive of interest and costs.

B. Factual Background

In 1959, Stawski was granted the exclusive right to distribute Zywiec's products throughout the United States. Prior to Stawski's appointment, Zywiec did not have its products sold in the United States. Over the past 43 years, Stawski expended substantial resources marketing the products and created substantial goodwill in Zywiec's products and in the name "Zywiec Beer." Stawski's sales of Zywiec's brands grew from zero in 1959 to more than 160,000 cases in 2001. Moreover, Stawski's sales have doubled since 1997. In addition to importing and acting as a master distributor selling to wholesalers in other states, Stawski is the exclusive distributor of Zywiec's products to retailers in the State of Illinois.

For years, the relationship between Stawski and Zywiec was amicable, profitable and mutually beneficial. In or about 1996, when Zywiec's current principal owner, Heineken International, N.V., first obtained an interest in Zywiec, that relationship began to change.

Zywiec required Stawski to execute an "Import and Wholesale Distribution Agreement" dated July 7, 1997 (the "Agreement"). Exercising the unequal bargaining power between brewer and wholesaler that the Illinois Beer Industry Fair Dealing Act ("IBIFDA") seeks to redress, Zywiec reduced Stawski's territory, which since 1959 had been the entire United States, by eliminating, without compensation, New York, New Jersey and Connecticut from Stawski's exclusive distribution rights. The Agreement contains a perpetual term, but states that either party may terminate upon 12-months written notice.

Also in violation of IBIFDA, the Agreement: (i) contains an arbitration clause requiring any disputes under the Agreement to be settled by the Arbitration Court of the Polish Chamber of Foreign Trade in Warsaw; and (ii) purports to be governed by Polish Civil Law.

In a letter dated July 10, 2002, Zywiec attempted to terminate the Agreement upon 12-months notice. In further violation of IBIFDA, the notice itself did not state the reasons for the termination and did not provide Stawski with an opportunity to cure.

On October 7, 2002, Stawski's counsel wrote to Zywiec informing Zywiec that its actions violated the IBIFDA, requiring that terminations be for good cause only and with an opportunity to cure. In a response dated November 14, 2002, Zywiec's counsel stated IBIFDA has no bearing on the parties' relationship, that Polish law exclusively applied, and that arbitration in Poland was the sole forum available to resolve the parties' dispute.

As a result, on December 2, 2002 Stawski was forced to file this action. On March 17, 2003, Stawski received a Notice dated February 25, 2003, informing Stawski that Zywiec had commenced an arbitration proceeding by filing a statement of claim with the Court of Arbitration at the Polish Chamber of Commerce (the "Polish Arbitration"). In the Polish Arbitration, Zywiec seeks resolution of the same issues brought by Stawski in this lawsuit. Zywiec also asserted that Polish law controls, and urged the arbitrators to totally ignore IBIFDA.

Zywiec then appeared in this action and moved the District Court for an Order staying this action and to compel Stawski to appear in the Polish Arbitration. Stawski cross-moved to stay the arbitration.

C. Proceedings Below

On May 22, 2003, the District Court issued an opinion and order granting Stawski's motion to stay the Polish Arbitration and denying Zywiec's motion to compel Stawski to arbitrate and stay the federal action. *See* 2003 WL 21209860 (Appendix B). The District Court recognized that if "this were the usual case" there would be little difficulty in enforcing the arbitration clause in the Agreement pursuant to the FAA.

The District Court, followed well-established Supreme Court precedent:

> In deciding whether a state statute enacted pursuant to the Twenty-first Amendment should prevail when in conflict with federal law, a two-step analysis should be applied. First, the

> 'threshold' matter is whether the statute does, in fact, conflict with federal law. 324 Liquor Corp. v Duffy, 479 U.S. 335, 341 (1987). If the conflict does exist, the relevant inquiry is 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with the express federal policies. 324 Liquor Corp., 479 U.S. at 347, quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984).

(Appendix B, at 13a-14a.)

After determining a conflict existed between the FAA and IBIFDA's forum requirements, the District Court found that "IBIFDA is sufficiently within the core values of the Twenty-first Amendment for the state statute to prevail over the FAA and the corresponding federal interests." (Appendix B, at 21a.) The District Court then ordered the Polish Arbitration stayed. Subsequently, the District Court granted Stawski a preliminary injunction enjoining the attempted termination on the basis that Stawski had established a degree of likelihood of success on its claim that Zywiec's actions violated the substantive provisions of IBIFDA, and that in the absence of preliminary relief, Stawski would be irreparably harmed. *See* 2003 WL 22290412 (N.D. Ill. Oct. 6, 2003) and 2003 WL 22595266 (N.D. Ill. Nov. 10, 2003).

On November 20, 2003, the Seventh Circuit vacated the District Court's order staying the Polish Arbitration. *See* 349 F.3d 1023 (7th Cir. 2003) (Appendix A). Discarding without explanation this Court's balancing test announced

in a long line of cases resolving conflicts between state liquor laws promulgated pursuant to the Twenty-first Amendment and federal laws, the Seventh Circuit simply held that all state liquor laws are pre-empted by federal law under the Supremacy Clause, regardless of whether the state statute addresses a core concern of the Amendment. Ignoring precedent established by this Court the Seventh Circuit eviscerated the power conferred to the states by the Twenty-first Amendment, holding that the scope of the Twenty-first Amendment is limited to allowing states to restrict imports without regard to the dormant commerce clause. 349 F.3d at 1026.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO PRESERVE THE AUTHORITY GRANTED TO THE STATES UNDER THE TWENTY-FIRST AMENDMENT

The Seventh Circuit ignored Supreme Court precedent on an issue of great national and international importance. Whether the Twenty-first Amendment allows the states to regulate the distribution of liquor within its borders even if the regulation conflicts with the FAA is an issue that affects not only every state, but many national and international businesses in an industry that generates billions of dollars in revenues annually. Approximately forty states have enacted statutes similar to IBIFDA establishing a three-tier liquor distribution system and redressing imbalances between powerful brewers and their distributors.

Illinois (as well as many other states) has determined that in order to ensure the enforcement of its legislation governing the creation and regulation of its liquor distribution

system, disputes between brewers and wholesalers be must be decided under Illinois law in a forum located in Illinois. The Seventh Circuit's decision dramatically undermines the ability of the Illinois legislature to regulate the distribution of alcoholic beverages within its borders. The Seventh Circuit's decision, if undisturbed, would eviscerate the Twenty-first Amendment and allow federal regulators to trample on the powers granted to the states to regulate the importation and distribution of liquor within their borders. The decision would also empower brewers to avoid state liquor regulations by compelling arbitration in foreign tribunals under foreign law.

The Seventh Circuit simply ignored the test established by this Court to resolve potential conflicts between state liquor regulations and federal law. The court failed to determine:

> Whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

324 Liquor Corp. v. Duffy, 479 U.S. 355, 347 (1984), quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

In failing to even apply the test, the Seventh Circuit not only ignored this Court's decisions in *324 Liquor Corp.* and *Capital Cities*, but also ignored this Court's repeated statement that Section 2 of the Twenty-first Amendment gives a state "virtually complete control over the importation and sale of liquor and the structure of the liquor distribution

system." *North Dakota v. United States*, 495 U.S. 423, 431 (1990), citing *California Retail Liquors Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Indeed, the Court of Appeals treated this case as if it involved cheese, not beer; as if there was no Twenty-first Amendment; as if years of well-established Supreme Court precedent did not even exist.

Contrary to the Seventh Circuit's decision, the Supreme Court did not, in *Midcal* and *Capital Cities*, eliminate the ability of a state to regulate liquor where such regulations are in conflict with federal law. The Court held in those cases that the state interests implicated by those regulations were not sufficiently related to the core interests of the Amendment and were therefore outweighed by the competing federal interests. Indeed, after *Midcal* and *Capital Cities* were decided, this Court upheld a state liquor regulation conflicting with federal policy in *North Dakota v. United States*, 495 U.S. 423 (1990), a case that the Seventh Circuit failed to consider or mention. More recently, in a well-reasoned decision following Supreme Court precedent, a bankruptcy court held that a provision in the United States Bankruptcy Code must yield to an Oregon liquor regulation. *In re G. Heileman Brewing Co.*, 128 B.R. 876, 885 (S.D.N.Y. 1999). The *Heileman* case, although not binding on the Seventh Circuit, was also ignored.

The Court of Appeals was simply incorrect in its view that the District Court's decision was unique in finding that the Twenty-first Amendment "allowed states to foreclose the application of federal statutes to the liquor business." Moreover, the "admission by counsel" noted by the court in its decision that "since Crisp, no other federal court has held that the twenty-first amendment allows any state to disregard

any federal statute or international treaty" was not made by counsel for Stawski, but by *amicus*, after Stawski's counsel's argument concluded. Had the question been posed to Stawski's counsel, the panel's attention would have been directed to this Court's decision in *North Dakota*, as well as the *Heileman* decision.

When the proper test is applied, the inescapable result (reached by the District Court) is the limitations placed on arbitration by IBIFDA are so closely related to the core powers reserved to the states by the Twenty-first Amendment, that the regulations are not pre-empted by the FAA or the New York Convention under the Supremacy Clause. Without the protection afforded to state liquor legislation under controlling Supreme Court precedent, the state's power to regulate its liquor distribution system is illusory. The federal government would be able, at its pleasure, to override state authority, and any brewer could avoid the application of such regulations simply by inserting a clause in their distribution agreement requiring foreign arbitration applying foreign law.

II. REVIEW IS ALSO WARRANTED BECAUSE THE SEVENTH CIRCUIT DECISION IS IN CONFLICT WITH SUPREME COURT PRECEDENT BY IMPLICITLY HOLDING THAT THE CHOICE OF LAW AND CHOICE OF FORUM PROVISIONS OF IBIFDA MUST BE ANALYZED IN A VACUUM

Implicit in the Seventh Circuit's decision is a finding that the forum selection provision and choice of law provision of the Illinois statute should be examined in a vacuum, independent of the overall liquor regulatory scheme of which they are a part. In doing so, however, the Seventh Circuit misinterpreted the Supreme Court precedent upon which it

relied, and ignored other Supreme Court precedent which demonstrates that the contrary is true; the choice of law and forum selection provisions of IBIFDA must be analyzed in the context of the statutory scheme of which they are a part.

Neither *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), nor *Sherk v. Alberto Culver Co.*, 417 U.S. 506 (1974), the cases relied on by the Seventh Circuit, support the view that forum selection and choice of law provisions should be independently analyzed and enforced. Rather, those cases merely recognize that statutory claims can be arbitrated and, in particular, under international arbitration. In both of those cases, however, the arbitration clauses were enforced as written. Moreover, in *Sherk*, the choice of law provision contained in the arbitration clause was also enforced.

Indeed, in *Sherk*, this Court noted: "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any business transaction." 417 U.S. 506, 517, 94 S. Ct. 2449, 2455 (1974). Rather than advance this goal, the Seventh Circuit hindered it. The decision as to choice of law ultimately resides with the arbitrator. Further, the judgment of a United States court purporting to require the application of the law of a particular jurisdiction is not binding upon international arbitrators who are not subject to the court's jurisdiction. Accordingly, under the Seventh Circuit's holding there can be no certainty as to *forum and choice of law* at the contract stage where, as here, a contract provides for arbitration in a foreign tribunal (deemed enforceable by the Seventh Circuit) and the application of foreign law (deemed unenforceable by the

Seventh Circuit). However, state statutes such as IBIFDA providing for both forum and choice of law satisfy the laudable goal of providing certainty in international transactions.

Second, as this Court has noted, a state liquor statutory scheme should be analyzed as a whole, not in its individual parts. *North Dakota v. United States*, 495 U.S. 423, 438-39 (1990) ("The labeling and reporting regulations are components of an extensive statewide system of regulations . . ."). In this case, as in *North Dakota*, the state statutory provisions in issue are part of the overall statutory scheme that created and regulates the three-tier distribution system for alcoholic beverages within Illinois. As District Court Judge Lefkow noted, following precisely the same logic as this Court in *North Dakota*, the forum selection provision, inclusive of the choice of law provision, is essential to enforcement of the overall statutory scheme.

CONCLUSION

Petitioner respectfully submits that the Seventh Circuit erred in essentially applying a *per se* rule against any state liquor regulation conflicting with federal policy. Left unreviewed, the Court of Appeals decision eviscerates the powers reserved to the states by the Twenty-first Amendment and would allow federal policy to usurp the states' ability to regulate the importation and distribution of alcoholic beverages within their borders.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED NOVEMBER 20, 2003

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-2553

STAWSKI DISTRIBUTING CO., INC.,

Plaintiff-Appellee,

v.

BROWARY ZYWIEC S.A., doing business as Zywiec Breweries, LLC,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 C 8708—Joan Humphrey Lefkow, *Judge*

Argued October 29, 2003 Decided November 20, 2003

Before FLAUM, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. The contract between Stawski, a distributor of beer, and Zywiec, a brewer, provides that any dispute will be arbitrated in Poland (where Zywiec's brewery is located) under Polish law. When Zywiec notified

Stawski that it would sell beer in Illinois through someone else, Stawski filed this suit in federal court under the diversity jurisdiction, see 28 U.S.C. § 1332(a)(2), contending that the termination would violate the Illinois Beer Industry Fair Dealing Act, 815 ILCS 720/1 to 720/9. Stawski asked the court for an injunction compelling Zywiec to continue providing beer; Zywiec asked the court to stay the litigation in favor of arbitration. The court granted Stawski's request and denied Zywiec's. The judge wrote that, even though the arbitration agreement is supported by both federal law and international treaty (the New York Convention, 21 U.S.T. 2517 (1970), implemented by 9 U.S.C. §§ 201-08), the Constitution's twenty-first amendment gives states the power to displace both national and international law for the liquor business. Zywiec immediately appealed, as it is entitled to do under 9 U.S.C. § 16(a)(1).

Stawski concedes that the parties' agreement to arbitrate would be enforceable for any business other than liquor. Illinois does not forbid arbitration between brewers and distributors, but it does require arbitration to be offered as a separate item on an a la carte menu, while Zywiec made arbitration part of a standard-form contract. Federal law, by contrast, disables states from subjecting arbitration to rules that are not generally applicable to other contractual choices, see *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and this means that take-it-or-leave-it offers are enforceable, see *Metro East Center for Conditioning and Health v. Qwest Communications International, Inc.*, 294 F.3d 924 (7th Cir. 2002), for Illinois enforces the (other) terms of form contracts. So national and international law—apart from any considerations under the twenty-first amendment—make enforceable Stawski's agreement to arbitrate in Poland.

Choice of law is another matter altogether. Neither the Federal Arbitration Act nor the New York Convention provides any shelter for a choice-of-law agreement that otherwise would violate state rules forbidding parties to opt out of certain substantive norms. The Supreme Court made this clear in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), its leading decisions on international arbitration of commercial disputes. The federal securities laws (the subject of *Scherk*) contain provisions forbidding the alteration of their rules by private agreement. 15 U.S.C. §§ 77n, 78cc(a). This led to the argument that arbitration could not be allowed, because either a choice-of-law clause or lack of familiarity with U.S. law might induce arbitrators hearing disputes in foreign lands not to apply our securities laws. The Justices concluded, however, that both domestic and international arbitration affects venue but not substance, and that a risk that arbitrators will not do their legal duty does not distinguish securities disputes from any others. The Court took the same approach to antitrust issues in *Mitsubishi*, holding that international arbitrators must apply U.S. law to transactions that could stifle competition in the United States, and that an opportunity to obtain judicial review under the New York Convention ensures that the panel will do so. (We added in *Baxter International, Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003), that the point of review is to ensure that the subject had been addressed and resolved rather than evaded; this differs from independent judicial review of the merits.)

Arbitration of statutory issues today is routine, even when substantive rights are not subject to waiver. See, e.g., *Circuit*

City Stores, Inc. v. Adams, 532 U.S. 105 (2001); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). The upshot is that the choice-of-law clause in the Stawski-Zywiec contract is invalid under Illinois law, which requires application of Illinois substantive law to Illinois distributorships. 815 ILCS 720/9(6). (Zywiec does not contend that our Treaty of Friendship, Commerce, and Navigation with Poland authorizes it to insist that Polish rather than Illinois law be applied to disputes of this kind.) But a need to apply domestic substantive law does not foreclose international arbitration between Stawski and Zywiec, any more than it did in *Mitsubishi*—another controversy arising out of a manufacturer's effort to change its arrangements with a dealership protected by state-law restrictions on unilateral alterations.

Does the twenty-first amendment entitle states to trump the parties' contract to arbitrate, the Federal Arbitration Act, and the nation's treaty commitments to its trading partners? As far as we can see, the district judge's affirmative answer is wholly novel. Twenty years or so ago, several courts held that the twenty-first amendment allowed states to foreclose the application of federal statutes to the liquor business. That position was unanimously dispatched by the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), with respect to the federal antitrust laws, and again in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), with respect to the federal telecommunications laws. It had not resurfaced since—until the district court's opinion in this case. Counsel candidly (and accurately) admitted at oral argument that, since *Crisp*,

no other federal court has held that the twenty-first amendment allows any state to disregard any federal statute or international treaty.

Section 2 of the twenty-first amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This language permits the states to restrict imports without regard to the "dormant commerce clause." See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). It does not have any more sweeping effect. In particular, as the Court held in *Midcal* and *Crisp*, and has reiterated since, "the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause". *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Illinois has not set out to curtail beer imports from Poland; Stawski argues, to the contrary, that Illinois law *compels* a Polish brewer to continue providing it with supplies. That is some distance from the language of § 2, which does not relieve Illinois of its obligation to respect federal statutes and treaties, "the supreme Law of the Land" (U.S. Const. Art. VI cl. 2). Suppose that Illinois had attempted to require all disputes arising out of the Beer Industry Fair Dealing Act to be litigated in state court. Could such a statute block Zywiec from removing to federal court under 28 U.S.C. § 1441(a), given the complete diversity of citizenship? Surely not. Cf. *Breuer v. Jim's Concrete of Brevard, Inc.*, 123 S.Ct. 1882 (2003). Yet a federal court would be a forum different from the one specified by Illinois law, just as arbitration occurs in a different forum. If removal under federal law is proper, then arbitration under federal

law must be proper—in either event, it is the Supremacy Clause that subordinates the state's preference to the federal rule.

Thus the contract's forum-selection clause is enforceable, even though its choice-of-law clause is not. At oral argument, Zywiec's counsel suggested that the two are so intertwined that it would be pointless to arbitrate in Poland if the panel could not apply Polish law. Counsel retreated from this position later, however, and we hesitate to bind him to what may have been a poor choice of words. We leave to the parties, and the district court on remand, consideration of the question whether choice of law may be separated from choice of forum. The judgment of the district court is vacated, and the matter is remanded for proceedings consistent with this opinion.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 22, 2003

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 8708
Judge Joan H. Lefkow

STAWSKI DISTRIBUTING CO., INC.,

Plaintiff,

vs.

ZYWIEC BREWERIES PLC,

Defendant.

MEMORANDUM OPINION AND ORDER

On December 2, 2002, plaintiff, Stawski Distributing Co., Inc. ("Stawski"), filed this action against defendant, Zywiec Breweries PLC ("Zywiec"), seeking to enjoin Zywiec from wrongfully terminating a beer distribution relationship under the Illinois Beer Industry Fair Dealing Act, 815 ILCS 720 *et seq.* ("IBIFDA" or the "Act"). Stawski, an Illinois corporation with its principal place of business in Chicago, is an importer and distributor of wine, spirits, beer and mineral water. Zywiec, a Polish corporation with its principal place of business in Poland, is a brewer of malt beverages and exports into the United States Zywiec Beer, Krakus Beer and Porter Beer (the "Products"). Stawski formerly served as the exclusive

distributor of Zywiec's Products in the United States, but currently imports and distributes only to the states of Illinois, Michigan, Wisconsin, Indiana, Ohio, Minnesota and Colorado. The parties executed an "Import and Wholesale Distribution Agreement" dated July 7, 1997 (the "Agreement"), containing a perpetual term that either party could terminate on 12-month's written notice. The Agreement also contained an arbitration clause purporting to have any disputes settled by the Arbitration Court of the Polish Chamber of Foreign Trade in Warsaw under Polish Civil Law.

On July 10, 2002, Zywiec sent Stawski a letter attempting to terminate the Agreement on 12-month's notice. Stawski maintains that the letter does not state the reasons for the termination and does not provide Stawski with an opportunity to cure in violation of the IBIFDA. Stawski alleges that the IBIFDA governs the relationship between the parties and requires a supplier to provide a statement of reasons for the cancellation of an agreement, a good-faith effort to resolve all disputes under any agreement, and a period to cure the stated reasons for termination. *E.g.*, 815 ILCS 720/3(2), 720/4. Therefore, Stawski filed this suit under the IBIFDA seeking declaratory relief, a permanent injunction, and damages under theories of unjust enrichment- misappropriation of goodwill, breach of covenant of good faith and fair dealing, unjust enrichment-misappropriation of intellectual property rights and breach of contract.

Zywiec, in belief that the filing of this action breached the Agreement, filed an arbitration demand with the Polish Arbitration Court in Warsaw on February 13, 2003. The arbitration is scheduled to take place in Poland on June 3,

2003. Currently, Zywiec has moved this court to stay the instant action and compel arbitration as per the terms of the Agreement. Stawski has cross-moved for the court to stay the arbitration on grounds that it has the right under the IBIFDA to bring this action alleging violation of the Act in this forum. Moreover, Stawski claims that the arbitration clause in the Agreement is invalid and violates the IBIFDA. Because this action is between a citizen of Illinois and a citizen of a foreign state and the amount in controversy exceeds $75,000, this court's jurisdiction rests in 28 U.S.C. § 1332(a)(2). For the reasons stated below, Zywiec's motion to stay this case and to compel arbitration is denied while Stawski's motion for a stay of arbitration is granted.

DISCUSSION

Stawski moves to stay the arbitration in this case on grounds that it has the right to bring an action for Zywiec's alleged violations of the IBIFDA in this forum. Stawski claims that Zywiec has (1) improperly terminated the Agreement without cause, without an opportunity to cure and without compensation, *see* 815 ILCS 720/4; (2) violated the IBIFDA by presenting Stawski with an agreement failing to comply with the IBIFDA because the Agreement required arbitration of all disputes, *see* 815 ILCS 720/5(12);[1] and (3) violated procedural provisions

1. 815 ILCS 720/5 provides

> No brewer shall:
>
> * * *
>
> (12) Present an agreement requiring the wholesaler to arbitrate all disputes without offering the wholesaler in writing the opportunity to reject arbitration and elect to resolve all disputes by maintaining a civil suit in accordance with this Act.

of the IBIFDA because that Act allows both parties the absolute right to reject arbitration of any particular claim and to have any claim arising out of the statute to be decided in a court of competent jurisdiction in Illinois. *See* 815 ILCS 720/9(1) & (6).[2]

---

2. 815 ILCS 720/9(1) provides,

> If the brewer or wholesaler who is party to an agreement pursuant to this Act fails to comply with this Act or otherwise engages in conduct prohibited under this Act, the affected party may maintain a civil suit in court if the cause of action directly relates or stems from the relationship of the individual parties under the agreement, provided that any such suit shall be filed in a State or federal court of competent jurisdiction located in Illinois.

815 ILCS 720/9(6) provides,

> With respect to any dispute arising under this Act or out of the relationship between brewer and wholesaler, the wholesaler and the brewer each has the absolute right before it has agreed to arbitrate a particular dispute to refuse to arbitrate that particular dispute. Arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the laws of this State, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. A brewer may not, as a condition of entering into or renewing an agreement, require the wholesaler to agree to arbitration instead of judicial remedies.

Zywiec, while disputing that the IBIFDA does not allow for parties to agree to general pre-dispute arbitration clauses, *see Geneva Int'l Corp. v. Urquell*, No. 00 C 0152, 2000 WL 1898573, at *2-*3 (N.D. Ill. Dec. 26, 2000), concedes that the statute attempts to restrict the ability of suppliers to present arbitration agreements to distributors. Based on the IBIFDA's restrictions on the ability of suppliers to enforce their arbitration agreements, Zywiec contends that the IBIFDA is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* Zywiec, therefore, asks the court to apply the FAA so as to stay this action and compel arbitration.

If this were the usual case, the court would have little difficulty disposing of these motions. The parties entered into the Agreement that contained an arbitration clause. The FAA provides that

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or any agreement in writing to submit to an arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This statute "compels judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). While Stawski argues that it may bring suit in this court for

violations of the IBIDFA and that the arbitration and forum selection clauses are invalid pursuant to the Act, under normal circumstances, because such a state statute would be in conflict with the FAA, it would be preempted under the Supremacy Clause. *See, e.g., Southland Corp. v.. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *Saturn Distrib. Corp. v. Paramount Saturn, Ltd .*, 326 F.3d 684, 687 (5th Cir. 2003) ("[T]he strong federal policy favoring arbitration preempts state laws that act to limit the availability of arbitration."); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 627 (3d Cir. 2003) ("The FAA prevents state law from undermining parties' contracts to arbitrate."); *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 367 (7th Cir. 1999) ("[I]f a state singles out arbitration agreements, either statutorily or judicially, by imposing restrictions separate from general contract law, that state law is preempted by the FAA.").

This case, however, presents an issue that complicates the matter. As the IBIFDA deals expressly with Illinois's power to regulate the liquor industry, it is "promulgated pursuant to authority of the State under the provisions of the Twenty-first Amendment to the United States Constitution and to promote the public's interest in fair, efficient and competitive distribution of malt beverage products." 815 ILCS 720/2(A). Section 2 of the Twenty-first Amendment to the United States Constitution provides that the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of

intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As the Supreme Court has stated on numerous occasions, this gives a state " 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States*, 495 U.S. 423, 431 (1990), citing *California Retail Liquors Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The question, therefore, becomes what effect the Twenty-first Amendment has on the FAA in this case.

Stawski advances the claim that while the FAA might otherwise preempt any statute restricting arbitration, in this case the Twenty-first Amendment preempts the FAA, which, in turn, causes the IBIFDA provisions to be "saved." Naturally, Zywiec disagrees and argues that the FAA applies and is not preempted under the Twenty-first Amendment. Apparently no case law exists dealing with a situation in which the Twenty-first Amendment conflicts with the FAA, although Stawski does cite to an analogous situation where a portion of the bankruptcy code was found to be preempted by the Twenty-first Amendment. *See In re G. Heileman Brewing Co., Inc.*, 128 B.R. 876, 885 (S.D.N.Y. 1991) ("The Twenty-first Amendment raises Oregon's direct interest in alcohol regulation within its borders to a greater plateau than the competing bankruptcy interest."). Moreover, Stawski points to several Supreme Court cases discussed below which have developed a framework for analyzing statutes enacted under the Twenty-First Amendment when a conflict with federal law is present.

In deciding whether a state statute enacted pursuant to the Twenty-first Amendment should prevail when in conflict

with federal law, a two-step analysis should be applied. First, the "threshold" matter is whether the statute does, in fact, conflict with federal law. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987). If a conflict does exist, the relevant inquiry is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *324 Liquor Corp.*, 479 U.S. at 347, quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

As mentioned above, both parties agree that the IBIFDA conflicts with the FAA. The FAA provides for the judicial enforcement of written arbitration agreements entered into between parties so long as the contract in which those agreements are contained "involves commerce" and no generally applicable contract defense applies. 9 U.S.C. § 2; *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 685-86 (1996). Moreover, the New York Convention, enabled through the FAA, *see* 9 U.S.C. § 201, requires a court to refer a dispute to arbitration when (1) there is an agreement to arbitrate, (2) providing for arbitration in the territory of a signatory of the Convention, (3) arising out of a legal relationship considered to be commercial, and (4) one party is not an American citizen or the commercial relationship has reasonable relation to one or more foreign states. 9 U.S.C. § 202; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-97 (1st Cir. 1982).

The IBIFDA conflicts with the broad policy of enforceability of arbitration clauses under the FAA in a number of ways. Initially, when a violation of the Act occurs,

the IBIFDA allows for suit to be filed in a state or federal court in Illinois. 815 ILCS 720/9(1). Thus, in a situation such as this one in which the agreement between the parties contains an arbitration clause specifying that disputes should be handled through arbitration in a particular forum, the IBIFDA conflicts with those provisions by allowing for suit to be brought in Illinois. In addition, the IBIFDA prohibits a brewer from even presenting an agreement requiring a wholesaler to arbitrate all disputes without offering the wholesaler in writing the opportunity to reject arbitration and elect to have all disputes decided by maintaining a civil action. 815 ILCS 720/5(12). This would run contrary to the FAA's broad policy of allowing for the enforceability of arbitration disputes agreed to by parties. Finally, Stawski reads the IBIFDA as providing that a wholesaler and brewer each has the absolute right before it has agreed to arbitrate a dispute to refuse to arbitrate that particular dispute. 815 ILCS 720/9(6). In addition, the Act provides that if arbitration is agreed to, it must be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the laws of Illinois. *Id.* Zywiec disagrees with Stawski's interpretation concerning the absolute right to refuse to arbitrate and argues that pre-dispute arbitration clauses are valid under the IBIFDA. *See Geneva Int'l Corp.*, 2000 WL 1898573, at *2-*3.[3] Nevertheless, Zywiec does not dispute that the IBIFDA invalidates a distributorship

3. Zywiec also cites *Geneva* for the conclusion that the FAA preempts any restrictions on arbitration clauses contained in the IBIFDA. While that is the ultimate conclusion the court reached in that case, there was no analysis presented under the Twenty-first Amendment. Thus, the court does not believe *Geneva* is instructive of the issue as presented here.

agreement's arbitration provisions which would normally be valid under the FAA. Given that the other conflicts listed above exist between the IBIFDA and the FAA, the court need not definitively decide whether this clause also presents a conflict.

Since conflicts do exist between the IBIFDA and the FAA, the next question for the court to determine is whether the interests implicated by the IBIFDA are so closely related to the powers reserved by the Twenty-first Amendment that the IBIFDA may prevail notwithstanding any conflict with the FAA. Phrased another way by the Supreme Court, when conflict between the Twenty-first Amendment and federal interests is present, "[t]he competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' " *Midcal Aluminum*, 445 U.S. at 946, quoting *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964).

In *Midcal Aluminum*, the Court considered a challenge to a state statute enacted under the Twenty-first Amendment which conflicted with federal antitrust interests under the Sherman Act, 15 U.S.C. §§ 1 *et seq.* The state statute in question provided that no "state-licensed wine merchant may sell wine to a retailer at other than the price set 'either in an effective price schedule or in an effective fair trade contract. . . .' " *Midcal Aluminum*, 445 U.S. at 99, quoting Cal. Bus. & Prof. Code Ann. § 24862 (West. Supp. 1980). The Court first examined the policies behind the Sherman Act, noting that the federal interest in competition promoted by the antitrust laws was both "familiar and substantial." *Id.* at 110. Moreover, while these antitrust laws were statutory

and not constitutional creations, the Court noted that Congress had " 'exercised all the power it possessed' under the Commerce Clause when it approved the Sherman Act." *Id.* at 111, quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932). Thus, the Court "acknowledge[d] the importance of the [Sherman Act's] procompetition policy." *Id.*

The Court went on to compare the federal interest in competition under the Sherman Act with the state's interest protected by the price maintenance system. The Court relied on another California Supreme Court case in finding that the interests protected by the California statute were temperance and orderly market conditions, specifically "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.* at 112, citing *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 451, 146 Cal. Rptr. 585, 598, 579 P.2d 476, 490 (1978). The Court relied on the California Supreme Court's previous opinion that such price controls did not promote temperance. *Id.* The Court also relied on the California Supreme Court's conclusion that such price controls were not necessary to the economic survival of small retailers, finding "no persuasive justification to continue 'fair trade laws which eliminate price competition among retailers.' " *Id.* at 113, quoting *Rice*, 21 Cal. 3d at 457, 146 Cal. Rptr. at 603, 579 P.2d at 494. Thus, the Court concluded that the "unsubstantiated" state concerns put forward in the case did not rise to the stature of the goals of the Sherman Act, and the Twenty-first Amendment "provides no shelter for the violation of the Sherman Act caused by the wine pricing program." *Id.* at 113-14.

Appendix B

In *Capital Cities Cable, Inc.*, the Court examined a state statute enacted under the Twenty-first Amendment that prohibited television broadcast of wine commercials in the state, thereby causing great difficultly to cable television operators who retransmitted out-of-state signals. 467 U.S. at 695-96. This state statute was in conflict with existing federal regulations of cable broadcasting promulgated by the Federal Communications Commission ("FCC") pursuant to powers delegated under the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* The Court found the federal interest in the FCC regulations governing signal carriage by cable television operators to be substantial, as this regulatory scheme struck "a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum numbers of viewers." *Id.* at 714.

By comparison, the Court found that Oklahoma's advertising ban on out-of-state signals was designed to further the state's interest in "discouraging consumption of intoxicating liquor." *Id.* at 714-15. The Court characterized this interest as "modest" or "narrow" given that the consumption of alcohol in Oklahoma increased in the last 20 years despite a ban on advertising of such beverages and Oklahoma had not chosen to press its campaign against alcohol on all fronts because print and broadcast commercials were still allowed for beer as well as advertisements for all liquors contained in newspapers, magazines and other

publications printed outside of the state. *Id.* at 715. The court noted,

> In contrast to state regulations governing the conditions under which liquor may be imported or sold within the State, therefore, the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment-that of exercising "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal Aluminum*, 445 U.S. at 110.
>
> When this limited interest is measured against the significant interference with the federal objective of ensuring widespread availability of diverse cable services throughout the United States-an objective that will unquestionably be frustrated by strict enforcement of the Oklahoma statute-it is clear that the State's interest is not of the same stature as the goals identified in the FCC's ruling and regulations. As in *Midcal Aluminum*, therefore, we hold that when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal

> power tips decisively in favor of the federal law, and enforcement of the state statue is barred by the Supremacy Clause.

Id. at 715-16.[4]

In this case, the court is presented with nothing to suggest that the federal interest in the FAA is insubstantial. The FAA was enacted in "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then longstanding English practice." *Circuit City Stores, Inc.*, 532 U.S. at 111. In passing the FAA, Congress "declared a national policy favoring arbitration. . . ." *Southland Corp.*, 465 U.S. at 10. The FAA's "involving commerce" provision has been given broad effect to apply to a wide range of contracts. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273-74 (1995). Moreover, similar to the Sherman Act, the FAA, as interpreted by the Supreme Court, implements Congress's intent "to exercise

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4. For other cases providing a similar analysis where statutes enacted under the Twenty-first Amendment conflict with federal interests, *see, e.g.*, *324 Liquor Corp.*, 479 U.S. at 350-51 (1987) (concluding that price control statute with "unsubstantiated" interests in protecting small retailers and promoting temperance did not afford immunity from the Sherman Act); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584-85 (1986) (finding New York statute preempted under federal law because it attempted to control sales in other states and not to regulate transportation and sale of alcoholic beverages in New York); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) ("State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.").

[its] commerce power to the full." *Circuit City Stores*, 532 U.S. at 112, quoting *Allied-Bruce*, 513 U.S. at 277. All of the above persuades the court that the federal interest in the enforceability of arbitration clauses is substantial.

Unlike the situations in *Midcal Aluminum* and *Capital Cities Cable, Inc.*, however, the court believes that the IBIFDA is sufficiently within the core values of the Twenty-first Amendment for the state statute to prevail over the FAA and the corresponding federal interests. The IBIFDA's purpose is to "promote the public's interest in fair, efficient and competitive distribution of malt beverage products by regulation and encouragement of brewer and wholesaler vendors to conduct their business relations." 815 ILCS 720/2(A). The Act purports to reach these goals by "assuring the beer wholesaler is free to manage its business enterprise, including the wholesaler's right to independently establish its selling prices" and by "assuring the brewer and the public of service from wholesalers who will devote reasonable efforts and resources to sales and distribution of all the brewer's products, which wholesaler has been granted the right to sell and distribute and maintains satisfactory sales levels." 815 ILCS 720/2(A)(i) & (ii).

In choosing a three-tiered system of alcohol distribution which includes suppliers, wholesalers and retailers, Illinois has properly exercised the powers it has been granted under the Twenty-first Amendment to structure the liquor distribution system or to facilitate "orderly market conditions," what the Seventh Circuit has referred to as a "euphemism for reducing competition and facilitating tax collection." *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d

848, 851 (7th Cir. 2000). As the goal of the Act is to encourage a stable brewer/wholesaler relationship so as to protect the liquor distribution system Illinois has chosen to implement, it certainly is sufficiently related to core state interests under the Twenty-first Amendment. *See North Dakota*, 495 U.S. at 431, *Captial Cities Cable*, 467 U.S. at 715, *Midcal Aluminum*, 445 U.S. at 110.

In response, Zywiec urges the court to examine only the restrictions on arbitration and forum selection contained in the IBIFDA to determine whether these restrictions are sufficiently related to core concerns under the Twenty- first Amendment. Zywiec argues that such restrictions are not related to core Twenty-first Amendment concerns involving the importation of liquor or the structure of any liquor distribution system. Even if the court were to assume, however, that such arbitration and forum restrictions contained in the IBIFDA should necessarily be looked at outside of the general purposes of the Act, this argument is problematic.

The IBIFDA's purpose is to promote fair and efficient brewer and wholesale relationships in Illinois. As evidenced by the Act's restrictions on forum and arbitration clauses and the restrictions it imposes on terminations of distributorships, at least part of the Act is meant to deal with perceived inequitable bargaining positions between brewers and wholesalers in their contracts. This is at the center of Stawski's claim, that as a wholesaler, it is not in a position to counter the demands of the brewer, despite what Stawski claims has been a long and prosperous relationship for each. Moreover, regardless of any agreement entered into between

a wholesaler and a brewer, Illinois certainly maintains a strong interest in regulating that relationship when the wholesaler is located in Illinois. To examine the restrictions on arbitration in a vacuum would be to eviscerate the protections Illinois hoped to provide by passage of the IBIFDA. If any arbitration clause were looked at as outside of the Act in this analysis, such clauses could easily be inserted into contracts and the IBIFDA would not apply in the very situations where the Act attempts to level a playing field Illinois public policy already considers slanted. It would also inhibit Illinois's ability to structure its liquor distribution system because the Act could be avoided (or bargained away) by simply placing a forum selection or arbitration clause in the contract, thereby restricting Illinois's ability to structure its three-tiered liquor distribution system. Without such restrictions the IBIFDA and the protections it attempts to impose would be rendered meaningless.[5]

Because the court concludes that a conflict exists between the provisions of the IBIFDA and the FAA and

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5. The court finds unpersuasive Zywiec's claim that if Illinois could regulate arbitration disputes under the Twenty-first Amendment it could regulate any method of dispute resolution and "abolish due process." Instead, when dealing with other sources of federal power outside of the Commerce Clause, "the reach of the Twenty-first Amendment is far more limited." *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 874 (N.D. Ill. 2000). *See also*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) ("[A]lthough the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, the Amendment does not license the State to ignore their obligations under other provisions of the Constitution.").

because the IBIFDA implicates issues sufficiently related to the core concerns reserved to states under the Twenty- first Amendment, the interests under the IBIFDA trump the requirements under the FAA in this case. Accordingly, Stawski's motion to stay the arbitration scheduled for June 3, 2003 is granted while Zywiec's motion to stay this case and compel arbitration is denied.

CONCLUSION

For the reasons stated above, Zywiec's motion for a stay of this case and to compel arbitration is denied [# 7] while Stawski's motion to stay arbitration is granted [# 12]. The court orders the arbitration between the parties scheduled for June 3, 2003 in Warsaw, Poland stayed pending resolution of this case. This case will be called for status on June 10, 2003 at 9:30 a.m. In the meantime, the parties are directed to meet in a sincere effort to resolve this case.

ENTER: _____

JOAN HUMPHREY LEFKOW
United States District Judge

Dated: May 22, 2003

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 11, 2003

Before

Hon. JOEL M. FLAUM, Chief Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

No. 03-2553

STAWSKI DISTRIBUTING CO., INC.,

Plaintiff-Appellee,

v.

BROWARY ZYWIEC S.A., doing business as
Zywiec Breweries, LLC,

Defendant-Appellant.

Appendix C

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 02 C 8708

Joan Humphrey Lefkow, *Judge*.

Order

Plaintiff-appellee filed a petition for rehearing on December 4, 2003. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore **DENIED**.

(2)

No. 03-1192

Supreme Court, U.S.
FILED
MAR 2 2 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STAWSKI DISTRIBUTING CO., INC.,

Petitioner,

v.

BROWARY ZYWIEC S.A., doing business as Zywiec Breweries, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent objects to the question presented in the Petition as nonconforming to Rule 14(1)(a). Respondent submits the following:

Whether the Federal Arbitration Act and New York Convention preempt an Illinois state law limiting arbitration of disputes between brewers and wholesalers.

STATEMENT PURSUANT TO RULE 29.6

Zywiec Browary S.A. makes the following disclosures:

a) Zywiec Browary S.A. is publicly traded on the Warsaw Stock Exchange.

b) Heineken International B.V., seated in Amsterdam owns 61.78% of the stock of Zywiec Browary S.A. and is publicly traded on the Luxembourg Bourse, Euronext Amsterdam and Euronext Brussels.

c) Harbin B.V. owns 30.82% of the stock of Zywiec Browary S.A. and is not publicly traded.

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STATEMENT OF THE CASE

The Petition filed by Stawski Distributing Co. misstates and misrepresents the facts, the opinion of the Seventh Circuit, and opinions of this Court, and should be denied. As set forth below, the very first factual statement contained in the Petition is misleading. More importantly, the Seventh Circuit followed and applied the controlling authority of this Court, including the most recent opinion on the relevant issue, being *44 Liquormart Inc. v. Rhode Island,* 517 U.S. 484 (1996), an opinion that Petitioner tellingly fails to cite, let alone to discuss. Indeed, the Seventh Circuit examined the offending state statutory section, which is contained in protectionist legislation, and found that it violates not only the Federal Arbitration Act, but also the New York Convention. The Seventh Circuit then examined whether the Twenty-first Amendment, U.S. CONST. amend. XXI, § 2, saved the statutory section, and held that the offending section was "some distance from the language of § 2 [of the Twenty-first Amendment]". The Seventh Circuit properly reversed the District Court. Despite Petitioner's efforts to mislead this Court, the Seventh Circuit applied controlling Supreme Court authority, correctly applied that authority, and reached the correct conclusion. Therefore, Respondent respectfully requests this Honorable Court to deny the Petition.

Proceedings Below

Browary Zywiec S.A. ("Zywiec")[1], a Polish beer manufacturer, had a contractual relationship with Stawski Distributing Company, Inc. ("Stawski"), an importer and

1. Zywiec was improperly referred to in the caption of the Complaint as Zywiec Breweries LLC. Zywiec's corporate name is Browary Zywiec S.A.

master distributor of wine, spirits, beer and mineral water, for the importation and distribution of Zywiec beer products in seven states of the United States, including Illinois. Zywiec was dissatisfied with Stawski's performance, and terminated Stawski in accordance with the termination clause in the agreement. On December 2, 2002, Stawski filed a Complaint against Zywiec in United States District Court, Northern District of Illinois. Plaintiff's Complaint alleges claims of wrongful termination under the Illinois Beer Industry Fair Dealing Act, 815 IL. COMP. STAT. ANN. 720 (2003) (the "Act"), and under equitable and common law theories, as well as a breach of the Import Agreement between the parties. On February 19, 2003 Zywiec was served in Poland pursuant to the Hague Convention. Zywiec filed a Motion to Stay and Compel Arbitration on March 11, 2003. On April 10, 2003, Stawski filed a Cross-Motion to Stay Arbitration and in Opposition to Defendant's Motion to Proceedings and Compel Arbitration. Stawski argued that Section 9(b) of the Act invalidated the arbitration clause in the Import Agreement. On May 22, 2003, the District Court entered an Opinion and Order denying Zywiec's Motion to Stay and to Compel Arbitration, and granting Stawski's Cross-Motion to Stay Arbitration Proceedings, by enforcing the Act's anti-arbitration provision. (Memorandum Opinion and Order) (hereinafter "D. Ct. Op.").

On November 30, 2003, the Seventh Circuit Court of Appeals vacated the District Court's order to stay arbitration and remanded. (Seventh Circuit Opinion and Judgment, published as *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023 (2003)) (hereinafter "7th Cir. Op."). On December 11, 2003, the Seventh Circuit denied Petitioner's motion for rehearing *en banc*. In its petition to this Court, Petitioner asks for a review of the Seventh

Circuit's vacation of the Order to Stay Arbitration as contrary to established Supreme Court precedent addressing instances of conflict between state laws enacted pursuant to the Twenty-first Amendment and federal law or international treaty.

In the Court of Appeals, Petitioner argued that the anti-arbitration provisions are necessary to the Illinois Beer Industry Fair Dealing Act's alleged purpose of promoting long-term beer distributors, and as such, further Illinois' power under the Twenty-first Amendment. Petitioner urged the Court of Appeals to affirm the District Court's decision that the anti-arbitration provisions of the Illinois state law should prevail over conflicting federal law and treaty, because the Act as a whole was enacted pursuant to the Twenty-first Amendment, and therefore furthered a core concern within the exclusive power of Illinois.

Rejecting the District Court's opinion, and Petitioner's arguments in support, the Court of Appeals correctly found that the anti-arbitration provisions of the Illinois Beer Industry Fair Dealing Act were not within Illinois' Twenty-first Amendment powers, noting that the anti-arbitration provisions of the Act are "some distance from the language of Section 2, which does not relieve Illinois of its obligation to respect federal statutes and treaties, 'the Supreme Law of the Land.'" 7th Cir. Op. at 5. The Court of Appeals concluded that the Act's anti-arbitration provisions were not protected under the Twenty-first Amendment.

The Court of Appeals relied specifically on the analysis in this Court's precedents as stated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (holding federal antitrust laws trumped California law resale price maintenance policies), and *Capital Cities Cable,*

Inc. v. Crisp, 467 U.S. 691 (1984) (holding the federal communications laws prevailed over an Oklahoma state law prohibiting certain liquor advertisements) and the Supremacy Clause (U.S. CONST. art. VI, cl. 2). The Court of Appeals concluded that Illinois could not use the cover of the Twenty-first Amendment to ignore the mandate of the Federal Arbitration Act. 9 U.S.C.A. §§ 1-16 (West 1999). The Seventh Circuit relied on and followed Supreme Court precedent in reaching that conclusion. The Court of Appeals also noted that had Illinois attempted to require all disputes arising out of the Act to be litigated in state court, the law would have similarly been preempted under federal law.

For the reasons stated herein, this Court should deny the petition for certiorari as lacking in merit.

COUNTER-STATEMENT OF FACTS

Contrary to Petitioner's assertion, from 1959 to 1992, Stawski contracted with the Polish Government to import Zywiec products into the United States. Stawski and Zywiec did not enter into their first contract with one another until 1992. That initial contract had a term of five years. At Stawski's initiative, just prior to expiration of the 1992 Agreement, Zywiec and Stawski negotiated the 1997 Import Agreement. The Import Agreement provided that either party could terminate at will by giving twelve months notice to the other party. Although Petitioner implies otherwise, the parties expressly agreed that any claims relating to the Agreement should be arbitrated in Poland. In particular, the Import Agreement states under the heading "Termination and Arbitration", "7.2 Any dispute arising out of this Agreement which can not be settled amicably between the parties shall be settled by the Arbitration Court of the Polish Chamber of

Foreign Trade in Warsaw. The parties undertake to execute its decision voluntarily." The Agreement also contained a choice of Polish law.

On July 10, 2002, Respondent notified Stawski in writing that the Import Agreement would be terminated, effective twelve months thereafter. The notice of termination was accompanied by a cover letter of the same date, which did in fact provide the specific reasons for the termination, despite Petitioner's claim that it did not. Although the termination comported with the parties' agreement as expressed in their Import Agreement — including the twelve month termination notice — Stawski now alleges that the termination violates the Illinois Beer Industry Fair Dealing Act.

The Act is an Illinois statute whose purpose is to restrict the ability of importers and brewers to terminate Illinois distributors. Petitioner asserts that the Act is a necessary component to the Illinois three-tier liquor distribution system, which is codified in the Illinois Liquor Control Act of 1934, 235 IL. COMP. STAT. ANN. 5 (2003). There is no basis for such an assertion by Petitioner. Petitioner's further assertion that approximately forty states have enacted statutes similar to the Act establishing a three-tier liquor distribution system and redressing imbalances between powerful brewers and their distributors is simply not true. While it may be true that forty states currently have a three-tier liquor distribution system (although Petitioner does not offer citations), a review of the law of the fifty states regarding the relationships between liquor distributors and liquor manufacturers reveals that only a handful have anti-arbitration provisions similar to the Act.

On October 1, 2003 Zywiec issued a second termination letter to Stawski which also complied with the Illinois Beer Industry Fair Dealing Act. Although the termination was to become effective on January 15, 2004, the termination was not implemented because the District Court entered an Order Granting Preliminary Injunction dated November 26, 2003 enjoining the parties to continue their course of performance under the Import Agreement.

Upon remand, Zywiec agreed to stipulate to the application of Illinois law in the Polish arbitration. Thereafter, on February 11, 2004, the District Court entered an Order Compelling Arbitration. The District ordered Stawski to file a claim for arbitration in Poland to arbitrate all disputes arising from either termination, or any other dispute under the Agreement. Stawski has done so.

SUMMARY OF REASONS FOR DENYING THE PETITION

This case involves the enforceability of an arbitration clause under the Federal Arbitration Act and New York Convention, 21 U.S.T. 2517 (1970), implemented by 9 U.S.C. §§ 201-08, in conflict with an Illinois state law which purports to regulate pursuant to the Twenty-first Amendment. Section 2 of the Twenty-first Amendment conveys upon states the power to regulate the transportation or importation of intoxicating liquors, and "permits the state to restrict imports without regard to the 'dormant commerce clause'". (7th Cir. Op., at 5). The Seventh Circuit, relying on this Court's decision in *44 Liquormart Inc. v. Rhode Island*,

517 U.S. 484 (1996),[2] and the balancing test articulated in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), concluded that the anti-arbitration provisions were not within Illinois' powers under the Twenty-first Amendment and were therefore pre-empted by the Supremacy Clause of the Constitution. In doing so the Court of Appeals noted that the anti-arbitration provisions were "some distance" from the power reserved to states under § 2 of the Twenty-first Amendment.

Petitioner contends that certiorari of the Seventh Circuit's opinion is necessary because the Seventh Circuit decision conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c). Throughout its Petition, Petitioner blatantly misrepresents the Seventh Circuit opinion to assert a conflict with Supreme Court precedent. There is no conflict. The Seventh Circuit explicitly followed Supreme Court precedent in rejecting Petitioner's argument that the anti-arbitration provisions of the Illinois Beer Industry Fair Dealing Act should pre-empt federal law and international treaty.

Petitioner would lead this Court to believe that the Seventh Circuit ruled that "state legislation passed under the grant of authority contained within the Twenty-first Amendment is *absolutely and always* subordinate to federal legislation pursuant to the Supremacy clause." The Seventh Circuit did nothing that extreme. It simply noted that, in the most recent instances that the issue has been presented, this

2. Despite the fact that the Seventh Circuit cites to *44 Liquormart*, and that it is this Court's most recent relevant authority on the subject, Stawski completely ignores *44 Liquormart* in its Petition.

Court has concluded that the federal law took precedence over the state law enacted pursuant to the Twenty-first Amendment.

Petitioner secondly contends that review is necessary because the Seventh Circuit relied on the Supremacy Clause in limiting the scope of the Twenty-first Amendment to a state's power to regulate liquor without concern of violating the dormant commerce clause. The Seventh Circuit was following Supreme Court precedent, in which this Court observed that "the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause", citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Indeed, this Court also noted that: "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders . . ." *Ibid.*

Finally, Petitioner asserts that the Seventh Circuit has failed to apply the balancing test as required under Supreme Court precedent. This Court has previously held in instances where there is a conflict between a state law directly implicated by the Twenty-first Amendment and a federal law or treaty, the Court must balance the competing laws. *Capital Cities*, 467 U.S. at 714. In this instance, the Court of Appeals concluded that the anti-arbitration provisions in question were clearly not within the state's power under the Twenty-first Amendment; therefore there was no need to engage in a detailed analysis of the purpose of the state law in conflict with the Federal Arbitration Act and international treaty.

Petitioner's blatant misrepresentation of the Seventh Circuit opinion robs the Petition of any intellectual merit. First, Petitioner repeatedly claims that the Seventh Circuit

held that the Federal Arbitration Act pre-empts Illinois' state liquor laws, when, in fact, the Court of Appeals determined that the Federal Arbitration Act pre-empted only the anti-arbitration provisions of the Act. Notably, Petitioner neglects to mention that the Court of Appeals also upheld the Act's requirement that Illinois law apply to any dispute arising between a brewer and its distributor. In addition, Petitioner submits to this Court a question which assumes that Illinois is exercising a core power under the Twenty-first Amendment, when, in fact, the Seventh Circuit decision rejects this very notion.

The Petition does not meet the standards justifying review on certiorari. SUP. CT. R. 10. The Petition should be denied.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S HOLDING BELOW CORRECTLY INTERPRETS THE REACH OF § 2 OF THE TWENTY-FIRST AMENDMENT ACCORDING TO SUPREME COURT PRECEDENT.

A. State Law Enacted Pursuant To the Twenty-first Amendment Does Not Always Trump Federal Law To the Contrary.

The Seventh Circuit held that the arbitration limitation in the Illinois Beer Industry Fair Dealing Act was not within Illinois' power under the Twenty-first Amendment and therefore was pre-empted by the Federal Arbitration Act and international treaty. Contrary to Petitioner's contention, the

Seventh Circuit did not hold "state legislation passed under the grant of authority contained within the Twenty-first Amendment is absolutely and always subordinate to federal legislation pursuant to the Supremacy Clause." Petition, p. i. The Seventh Circuit recognized that the States do have broad powers under the Twenty-first Amendment: "The Twenty-first amendment gives states the power to restrict imports without regard to the dormant commerce clause." (7th Cir. Op. 5). *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

In asserting that the Court of Appeals applied "a per se rule against any state liquor regulation conflicting with federal policy" (Petition, p. 14), Petitioner grossly misrepresents the Court of Appeals' ruling. Petitioner turns on its head the Seventh Circuit's ruling — that State law enacted pursuant to the Twenty-first amendment *does not* always trump conflicting federal law. The Seventh Circuit properly concluded that the Twenty-first Amendment does not give states the power to disregard important federal laws in conflict with state laws regarding issues not directly related to the State's power to regulate liquor within its borders. This is consistent with this Court's decisions in recent years that state law indirectly related to the state's powers under the Twenty-first Amendment does not pre-empt federal law. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980), with respect to the federal antitrust laws and a conflicting state law creating liquor pricing policies, and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), with respect to the federal telecommunications laws in conflict with a state law restarting liquor advertising.

The case of *North Dakota v. United States*, 495 U.S. 423 (1990), relied on by Petitioner, is no exception. In *North Dakota*, the state law was directly related to the state's power under the Twenty-first Amendment, and the federal law was only indirectly in conflict. Petitioner also relies on *In re G. Heileman*, 128 B.R. 876 (Bankr. S.D.N.Y. 1991), a New York Bankruptcy Court decision interpreting Oregon law, where the Court held that a bankruptcy code provision allowing discretion could be trumped by a state law prohibiting such discretion. Because the bankruptcy code statute in question was discretionary, it could be disregarded even in the absence of a contrary state law.

The Seventh Circuit ruling that it is not true that "the Twenty-first amendment allow[s] states to foreclose the application of federal statutes to the liquor business" is consistent with this Court's precedent, albeit contrary to the outcome Petitioner had hoped for.

B. Illinois Does Not Have the Power Under the Twenty-first Amendment to Disregard the Federal Arbitration Act and International Treaty.

The Seventh Circuit noted the routine with which arbitration agreements are now enforced under the Federal Arbitration Act. 7th Cir. Op. at 3-4. After considering the scope of Section 2 of the Twenty-first Amendment, the Court of Appeals rejected Stawski's argument that Illinois was acting to further the transport and import of liquor by limiting arbitration of claims between brewer and distributor. The Court of Appeals relied on this Court's prior decisions in concluding that the Federal Arbitration Act and an international treaty pre-empt Illinois' arbitration limitations under the Act.

The last time this issue was before this Court, the Court observed:

> Although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712, 104 S.Ct. 2694, 2707, 81 L.Ed.2d 580 (1984). That general conclusion reflects our specific holdings that the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause.

44 Liquormart, 517 U.S. at 516 (citations omitted). This quote is repeated almost verbatim by the Court of Appeals in support of its decision that the Supremacy Clause trumped Illinois' attempt to restrict arbitration in violation of the Federal Arbitration Act and international treaty. Petitioner ignores this decision, without even so much as a mention in its Petition.

The scope of the state's power pursuant to the Twenty-first Amendment to regulate liquor "without regard to the dormant commerce clause" does not allow Illinois to disregard Congress' exercise of its Commerce Clause powers. The Seventh Circuit rightly held that because the anti-arbitration provisions in the Illinois Beer Industry Fair Dealing Act are not sufficiently related to the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors,

in violation of the laws thereof," they do not prevail over the important federal policies embodied in the Federal Arbitration Act and the New York Convention, an international treaty. Contrary to Petitioner's assertions, the Seventh Circuit did not hold that Illinois' "liquor laws" were pre-empted by the Federal Arbitration Act and international treaty — only that the arbitration restriction contained in the Illinois Beer Industry Fair Dealing Act was pre-empted. Therefore, federal law which is supreme to state law in the absence of constitutional protection, must prevail.

C. The Seventh Circuit Followed the Analysis Established By the Supreme Court In Reaching Its Conclusion That the Anti-Arbitration Provisions Were Not Within Illinois' Core Power Under the Twenty-first Amendment.

Petitioner contends the Seventh Circuit's decision is fundamentally flawed because the Court, "[d]iscard[ed], without explanation, the balancing test established by this Court as the method for resolving potential conflicts between state enactments promulgated pursuant to the Twenty-first Amendment and federal law". As observed above, the Seventh Circuit closely followed this Court's most recent articulation of the standard of review, set forth in *44 Liquormart*. In addition, the Seventh Circuit did consider "whether the interests implicated by [the] state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies," *Capital Cities Cable, Inc v. Crisp*, 467 U.S. at 714, when the Seventh Circuit concluded:

> Illinois has not set out to curtail beer imports from Poland; Stawski argues, to the contrary, that

> Illinois law *compels* a Polish brewer to continue providing it with supplies. That is some distance from the language of Section 2, which does not relieve Illinois of its obligation to respect federal statutes and treaties, "the supreme Law of the Land" (U.S. Const. art. VI, cl. 2).

7th Cir. Op. 5 (emphasis in original).

Because Illinois' arbitration limitation in the Act was "some distance" from the scope of Illinois' powers under the Twenty-first Amendment, and because the Court of Appeals had already observed the validity and importance of the Federal Arbitration Act and New York Convention, it was not necessary for the Seventh Circuit to engage in any additional analysis. The Court of Appeals applied the standard in *Capital Cities* when it held that because the arbitration limitation did not further a core power of Illinois under the Twenty-first Amendment, the limitation was not protected from pre-emption under the Supremacy Clause.

II. THE SEVENTH CIRCUIT DECISION FOLLOWED SUPREME COURT PRECEDENT THAT THE ARBITRATION CLAUSE IS SEPARABLE FROM THE CHOICE OF LAW CLAUSE.

A. The Forum Selection Clause and Choice-of-Law Clause are Separate.

The Seventh Circuit held that the "forum-selection clause [in the Import Agreement] is enforceable, even though its choice of law clause is not . . ." (7th Cir. Op. at 6). Petitioner contends that the cases relied on by the Seventh Circuit do not "support the view that forum selection and choice of law

provisions should be independently analyzed and enforced". Petitioner does not cite a single case in which any court has held that the issues of forum and substantive law were inseparable. Rather, Petitioner asserts that two Supreme Court decisions, *Mitsubishi* and *Scherk*, "merely recognized that statutory claims can be arbitrated", without regard to the choice of law provisions. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Contrary to Petitioner's assertion, both *Mitsubishi* and *Scherk* recognize that choice of law and choice of forum are separable. In its opinion in this case, the Seventh Circuit made it clear that as a general rule, the issues of forum and substantive law *can and must* be treated separately:

> Neither the Federal Arbitration Act nor the New York Convention provides any shelter for a choice-of-law agreement that otherwise would violate state rules forbidding parties to opt out of certain substantive norms. The Supreme Court made this clear in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974), its leading decisions on international arbitration of commercial disputes. The federal securities laws (the subject of *Scherk*) contain provisions forbidding the alteration of their rules by private agreement. 15 U.S.C. §§ 77n, 78cc(a). This led to the argument that arbitration could not be allowed, because either a choice-of-law clause or lack of familiarity with U.S. law might induce arbitrators hearing disputes in foreign lands not to apply our

> securities laws. The Justices concluded, however, that both domestic and international arbitration affects venue but not substance, and that a risk that arbitrators will not do their legal duty does not distinguish securities disputes from any others. The Court took the same approach to antitrust issues in *Mitsubishi*, holding that international arbitrators must apply U.S. law to transactions that could stifle competition in the United States, and that an opportunity to obtain judicial review under the New York Convention ensures that the panel will do so.

(7th Cir. Op. at 3.) Petitioner apparently agrees, as it acknowledges that "the decision as to choice of law ultimately resides with the arbitrator." Only if the choice of law and choice of forum are separable can the choice of law be left to the decision of the arbitrators.

Petitioner also asserts that "state statutes such as Illinois Beer Industry Fair Dealing Act providing for both forum and choice of law" rather than contractual agreements as to choice of law and choice of forum are the only way to ensure the certainty necessary to international transactions. This argument, however, conflicts with the specific language of the Supreme Court's opinions and the Seventh Circuit's rationale. First, ignoring a valid arbitration clause in an international agreement is certainly not the kind of consistency and predictability the Supreme Court had in mind. Instead, this Court has explained that predictability would be fostered by the consistent enforcement of valid arbitration clauses, the very position urged here by Respondent.

Second, applying the forum provision of a *state* statute to an international agreement that specifically provides for foreign arbitration provides no predictability whatsoever. The same foreign defendant could be dragged into a different forum, with different procedural rules, with respect to each contract it has with American parties, despite the fact that the parties had entered into valid arbitration agreements. The situation is made even more unpredictable because not all states have a comprehensive statute governing beer distributorships. Therefore, a foreign defendant could not know which agreements would be subject to state forum laws and which would not. This certainly does *not* foster predictability as Petitioner would have this Court believe. In fact, it does the opposite.

Petitioner essentially argues that under the Twenty-first Amendment, the public policy interest in enforcing the Illinois Beer Industry Fair Dealing Act outweighs the agreement to arbitrate. This argument attempts an end-run around the Supremacy Clause, the New York Convention, and the Federal Arbitration Act. The Seventh Circuit held that the Twenty-first Amendment does not allow the Act's forum provision to "trump" the Federal Arbitration Act and international treaty. The Supreme Court has also held that domestic public policy "considerations are not controlling in an international agreement." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972). It stands to reason that if the Act does not *directly* trump the federal and international laws requiring enforcement of an agreement to arbitrate, it cannot do so *indirectly* as a justification for finding the arbitration and choice-of-law clauses inseparable.

B. The Anti-Arbitration Provisions of the Illinois Beer Industry Fair Dealing Act Must Be Considered Separately from the Illinois Statutory Scheme for Liquor.

The Court of Appeals recognized that, in enacting the anti-arbitration provisions of the Illinois Beer Industry Fair Dealing Act, "Illinois has not set out to curtail beer imports from Poland". However, Petitioner argues that a "state liquor statutory scheme should be analyzed as a whole, not in its individual parts." The issue before the Seventh Circuit was whether *the arbitration clause* in the parties' Agreement should be enforced when in conflict with a state restriction on arbitration, not the entire Illinois three tier distribution system. The Seventh Circuit recognized the absurdity of viewing the Illinois regulatory scheme as whole when it noted:

> Suppose that Illinois had attempted to require all disputes arising out of the Beer Industry Fair Dealing Act to be litigated in state court. Could such a statute block Zywiec from removing to federal court under 28 U.S.C. § 1441(a), given the complete diversity of citizenship. Surely not. *Cf. Breuer v. Jim's Concrete of Brevard, Inc.*, 123 S. Ct. 1882 (2003). Yet a federal court would be a forum different from the one specified by Illinois law, just as arbitration occurs in a different forum. If removal under federal law is proper, then arbitration under federal law must be proper.

(7th Cir. Op. at 5-6).

Contrary to petitioner's assertion that entire acts must be examined, this Court has determined whether a state liquor regulation conflicts with federal law by examining the regulation in question, not the entire scheme of regulation. *See Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275-6 (1984) (holding that the specific tax exemption under the Hawaii Liquor tax was not within a core concern of the Twenty-first Amendment because its purpose was to promote a local industry); *Kendall-Jackson Winery Ltd. v. Branson*, 82 F. Supp. 2d 844, 864-65 (N.D. Ill. 2000) (reviewing the specific discriminatory sections of the Illinois Wine Industry Fair Dealing Act in evaluating whether the Act was permissible under the dormant Commerce Clause); *see also Mt. Hood Beverage Company v. Constellation Brands, Inc.*, 63 P.3d 779, 789 (Wash. Sup. Ct. 2003) (holding that when a statute discriminates against interstate commerce in violation of the commerce clause, the discriminatory clause, not the statute as a whole, must be justified by core concerns of the Twenty-first Amendment in order to survive).

Petitioner's only support for its argument is *dicta* in *North Dakota v. United States*, 495 U.S. 423, 438-39 (1990), in which the Court recognizes that the regulations at issue were an important part of the state's regulatory scheme. However, the Court in *North Dakota* examined the purpose of the specific provisions, and the conflict between those provisions and the federal regulations, in reaching its conclusion that the actual conflict between the labeling and reporting requirements of state law were only indirectly in conflict with federal law, and therefore the Court let the state provision, which did further a core Twenty-first Amendment concern, stand.

C. The Parties Have Agreed to Apply the Illinois Beer Industry Fair Dealing Act in the Polish Arbitration.

Petitioner contends throughout its Petition that there is a potential harm in the Seventh Circuit's decision, in that it would "empower brewers to avoid state liquor regulations by compelling arbitration in foreign tribunals under foreign law." This is false. The Seventh Circuit considered the choice of law clause in the parties and concluded, without compunction, "[c]hoice of law is another matter altogether. Neither the Federal Arbitration Act nor the New York Convention provides any shelter for a choice of law agreement that otherwise would violate state rules forbidding parties to opt out of certain substantive norms." The Court went on to further state, "[t]he upshot is that the choice-of-law clause in the Stawski-Zywiec contract is *invalid* under Illinois law, which requires application of Illinois substantive law to Illinois distributorships." (7th Cir. Op. at 4) (emphasis added). Finally, the Seventh Circuit remanded this case to the District Court to consider whether choice of law may be separated from choice of forum based upon the Seventh Circuit's holding that "the contract's forum selection clause is enforceable, even though its choice of law clause is not." 7th Cir. Op. 6. Indeed, Stawski has now filed an arbitration claim in Poland.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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